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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

AT&T CORP.,
Plaintiff,
v.
DATAWAY INC. dba DATAWAY
DESIGNS,
Defendants.

Case No. C07-02440 EDL

**NOTICE OF MOTION AND MOTION
OF PLAINTIFF AND COUNTER-
DEFENDANT AT&T CORP. FOR
SUMMARY JUDGMENT OR PARTIAL
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES; REQUEST FOR
JUDICIAL NOTICE; DECLARATION
OF JAMES LAKE; DECLARATION OF
TIMOTHY CARL AIRES**

[F.R.C.P., Rule 56]

DATE: August 5, 2008
TIME: 9:30 a.m.
CTRM: E, 15th Floor

PLEASE TAKE NOTICE that at 9:30 a.m. on August 5, 2008 in Courtroom E, 15th Floor of this Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, the motion of Plaintiff and Counterdefendant AT&T Corp. for summary judgment or alternatively, partial summary judgment, will be brought on for hearing.

The motion for summary judgment is made pursuant to Federal Rules of Civil Procedure, Rule 56 on the grounds that there is no genuine issue of material fact in this civil action as to the Complaint of Plaintiff AT&T Corp. (Docket No. 1) and Counterclaim of

1 Counterclaimant Dataway Inc. dba Dataway Designs (Docket No. 31) in their entirety, and,
2 therefore, Plaintiff AT&T Corp. is entitled to judgment on the Complaint of Plaintiff AT&T
3 Corp. (Docket No. 1) as a matter of law against Defendant Dataway Inc. dba Dataway
4 Designs in the sum of \$11,534.67, together with prejudgment interest of \$5.69 per day from
5 September 25, 2006, and Counterclaimant Dataway Inc. dba Dataway Designs is entitled to
6 nothing as a matter of law on the Counterclaim of Counterclaimant Dataway Inc. dba
7 Dataway Designs (Docket No. 31).

8 The motion for partial summary judgment is made pursuant to Federal Rules of Civil
9 Procedure, Rule 56 on the grounds that there is no genuine issue of material fact as to the
10 first claim for relief in the Complaint of Plaintiff AT&T Corp. (Docket No. 1) and,
11 therefore, Plaintiff AT&T Corp. is entitled to judgment as a matter of law against Defendant
12 Dataway Inc. dba Dataway Designs in the sum of \$11,534.67, together with prejudgment
13 interest of \$5.69 per day from September 25, 2006.

14 The motion for partial summary judgment is made pursuant to Federal Rules of Civil
15 Procedure, Rule 56 on the grounds that there is no genuine issue of material fact as to the
16 second claim for relief in the Complaint of Plaintiff AT&T Corp. (Docket No. 1) and,
17 therefore, Plaintiff AT&T Corp. is entitled to judgment as a matter of law against Defendant
18 Dataway Inc. dba Dataway Designs in the sum of \$11,534.67, together with prejudgment
19 interest of \$5.69 per day from September 25, 2006.

20 The motion for partial summary judgment is made pursuant to Federal Rules of Civil
21 Procedure, Rule 56 on the grounds that there is no genuine issue of material fact as to the
22 first counterclaim for relief in the Counterclaim of Counterclaimant Dataway Inc. dba
23 Dataway Designs (Docket No. 31) and, therefore, Counterdefendant AT&T Corp. is entitled
24 to judgment as a matter of law.

25 The motion for partial summary judgment is made pursuant to Federal Rules of Civil
26 Procedure, Rule 56 on the grounds that there is no genuine issue of material fact as to the
27 second counterclaim for relief in the Counterclaim of Counterclaimant Dataway Inc. dba
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1 Dataway Designs (Docket No. 31) and, therefore, Counterdefendant AT&T Corp. is entitled
2 to judgment as a matter of law.

3 The motion for partial summary judgment is made pursuant to Federal Rules of Civil
4 Procedure, Rule 56 on the grounds that there is no genuine issue of material fact as to the
5 third counterclaim for relief in the Counterclaim of Counterclaimant Dataway Inc. dba
6 Dataway Designs (Docket No. 31) and, therefore, Counterdefendant AT&T Corp. is entitled
7 to judgment as a matter of law.

8 The motion for partial summary judgment is made pursuant to Federal Rules of Civil
9 Procedure, Rule 56 on the grounds that there is no genuine issue of material fact as to the
10 fourth counterclaim for relief in the Counterclaim of Counterclaimant Dataway Inc. dba
11 Dataway Designs (Docket No. 31) and, therefore, Counterdefendant AT&T Corp. is entitled
12 to judgment as a matter of law.

13 The motion for partial summary judgment is made pursuant to Federal Rules of Civil
14 Procedure, Rule 56 on the grounds that there is no genuine issue of material fact as to the
15 fifth counterclaim for relief in the Counterclaim of Counterclaimant Dataway Inc. dba
16 Dataway Designs (Docket No. 31) and, therefore, Counterdefendant AT&T Corp. is entitled
17 to judgment as a matter of law.

18 If the Court determines that summary judgment or partial judgment would be
19 improper on this record, the Court is requested, after examining the pleadings and evidence
20 before it and by interrogating the attorneys, to enter an order specifying what facts are not
21 genuinely at issue and what issues are without substantial controversy — including items of
22 damages or other relief — pursuant to Federal Rules of Civil Procedure, Rule 56(d)(1),
23 Williams v. Sinclair, 529 F.2d 1383 (9th Cir. 1975), and USDC, ND CA Local Rule 56-3.

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The motion is based on this notice of motion, the memorandum of points and authorities in support thereof, the accompanying request for judicial notice, the accompanying declaration of James Lake, the accompanying declaration of Timothy Carl Aires, and upon such oral argument as may be presented at the hearing of this motion.

DATED: July 1, 2008

AIRES LAW FIRM

y:
Timothy Carl Aires, Esq.
Attorney for Plaintiff and Counterdefendant,
AT&T CORP.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2

3 1. STATEMENT OF UNCONTROVERTED FACTS.

4

5 AT&T Corp. ("AT&T") is a corporation organized and existing under the laws of the
 6 State of New York with its principal place of business located at 1 AT&T Way, Bedminster,
 7 New Jersey and authorized to do business in the State of California and is a common carrier
 8 providing telecommunications services under published tariffs. [*Uncontroverted Fact No.*
 9 *1: Declaration of James Lake, p. 1:17-21, ¶3.*]

10 Dataway Inc. ("Dataway") is a corporation organized and existing under the laws of
 11 the State of California with its principal place of business within this district and located at
 12 180 Redwood Street, San Francisco, California 94102 and doing business as Dataway
 13 Designs. [*Uncontroverted Fact No. 2: Answer to Complaint (Docket No. 31), p. 2:9-10, ¶2.*]

14 This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331, 1332 and
 15 1337. [*Uncontroverted Fact No. 3: Complaint (Docket No. 1).*] Further, venue is proper
 16 under Title 28 U.S.C. §1391(a)(2). [*Uncontroverted Fact No. 4: Answer to Complaint*
 17 (*Docket No. 31*), p. 2:9-10, ¶2.]

18 AT&T Tariff 30, Section 5, "Casual Calling Services", permits callers who are not
 19 pre-subscribed to AT&T to access AT&T's switched network for completion of their state-
 20 to-state and international dial station calls by dialing carrier access code, 1010288.
 21 [*Uncontroverted Fact No. 5: Declaration of James Lake, p. 1:23-26, ¶4.*] AT&T Tariff 30
 22 is filed with the Federal Communications Commission (the "FCC") under 47 C.F.R. §61.19.
 23 [*Uncontroverted Fact No. 6: Declaration of James Lake, p. 1:26-27, ¶4.*]

24 On July 24, 2006, the telephone system owned and operated by Dataway was allegedly
 25 compromised by an unauthorized intervening third party accessing the AT&T network by
 26 dialing carrier access code 1010288. [*Uncontroverted Fact No. 7: Declaration of James*
 27 *Lake, p. 1:27-2:3, ¶4; Declaration of Timothy Carl Aires, p. 1:20-23, ¶5 (Exhibit E –*
 28 *Deposition Transcript of Simon Lewis, pp. 8:17-11:23).*] No unauthorized changes to a

1 subscriber's telephone service were made by AT&T. [Uncontroverted Fact No. 8:
2 *Declaration of James Lake, p. 2:3-5, ¶4.*] The calls made on July 24, 2006 were not the
3 responsibility of AT&T, but rather a security failure on the part of Dataway if the calls were
4 indeed unauthorized. [Uncontroverted Fact No. 9: *Declaration of James Lake, p. 2:5-7, ¶4.*] The
5 AT&T, did not contract to, or otherwise have a duty to, prevent access through the telephone
6 system owned and operated by Dataway to AT&T by dialing carrier access code 1010288.
7 [Uncontroverted Fact No. 10: *Declaration of James Lake, p. 2:7-9, ¶4.*]

8 Dataway was billed for the charges incurred when its telephone system was allegedly
9 compromised on July 24, 2006 by a written invoice. [Uncontroverted Fact No. 11:
10 *Declaration of James Lake, p. 3:12-14, ¶6.*] AT&T provided telecommunications services
11 to Dataway pursuant to AT&T Tariff F.C.C. No. 30 which makes Dataway liable for the
12 payment of charges for calls placed using its system through AT&T by dialing carrier access
13 code 1010288. [Uncontroverted Fact No. 12: *Declaration of James Lake, p. 3:14-17, ¶6.*] These
14 charges amount to \$11,534.67 and were included on an invoice presented to Dataway
15 due September 25, 2006. [Uncontroverted Fact No. 13: *Declaration of James Lake, p. 3:17-*
16 *19, ¶6.*] Pursuant to AT&T Tariff F.C.C. No. 30, payment was due upon presentation of the
17 invoice. [Uncontroverted Fact No. 14: *Declaration of James Lake, p. 3:18-19, ¶6.*] There
18 is now due and owing from Dataway to AT&T the sum of \$11,534.67, together with
19 prejudgment interest of \$5.69 per day from September 25, 2006 using the rate of 18% per
20 annum pursuant to AT&T Tariff F.C.C. No. 30, Section 3.5.4. [Uncontroverted Fact No. 15:
21 *Declaration of James Lake, p. 3:23-4:2, ¶7.*] There is no evidence that AT&T waived its
22 claim involving the charges amounting to \$11,534.67. [Uncontroverted Fact No. 16:
23 *Declaration of Timothy Carl Aires, p. 1:15-23, ¶4 (Exhibit D – Deposition Transcript of*
24 *Francisco J. Molieri, pp. 58:6-59:14) and ¶5 (Exhibit E – Deposition Transcript of Simon*
25 *Lewis, p. 48:4-11).*]

26 AT&T made demand for the charges amounting to \$11,534.67 and a billing dispute
27 ensued. [Uncontroverted Fact No. 17: *Declaration of Timothy Carl Aires, pp. 1:15-18, ¶4*
28 *(Exhibit D – Deposition Transcript of Francisco J. Molieri, pp. 16:17-20:9).*] Telephone

1 service to Dataway was never terminated. [*Uncontroverted Fact No. 18: Declaration of*
 2 *Timothy Carl Aires, p. 1:15-23, ¶4 (Exhibit D – Deposition Transcript of Francisco J.*
 3 *Molieri, p. 26:8-11, 18-21) and ¶5 (Exhibit E – Deposition Transcript of Simon Lewis, pp.*
 4 *47:24-48:1).*] The “damages” suffered by Dataway are claimed to be^{1/} “time expenditure”,
 5 i.e., an estimate of the value of the time committed by employees of Dataway in the search
 6 for a resolution of the billing dispute with AT&T [*Uncontroverted Fact No. 19: Declaration*
 7 *of Timothy Carl Aires, p. 1:12-18, ¶3 (Exhibit C – Responses of Dataway Inc. to Special*
 8 *Interrogatories, Set No. One, Interrogatory No. 6, p. 11:10-12:9) and ¶4 (Exhibit D –*
 9 *Deposition Transcript of Francisco J. Molieri, p. 26:22-35:11)], and “business interruption”,
 10 i.e., an estimate, based upon a mere assumption, of the gross revenue which allegedly could
 11 have been generated from Dataway’s business activities had employees of Dataway not been
 12 allocating time to seeking a resolution of the billing dispute with AT&T [*Uncontroverted*
 13 *Fact No. 20: Declaration of Timothy Carl Aires, p. 1:12-18, ¶3 (Exhibit C – Responses of*
 14 *Dataway Inc. to Special Interrogatories, Set No. One, Interrogatory No. 6, p. 11:10-12:9)*
 15 *and ¶4 (Exhibit D – Deposition Transcript of Francisco J. Molieri, p. 35:15-21)].**

16

17 2. DISCUSSION

18

19 (A) THE APPLICABLE STANDARD OF REVIEW ON MOTIONS UNDER
 20 RULE 56.

21

22 Summary judgment is granted when no genuine issue exists as to any material fact and
 23 the moving party is entitled to judgment as a matter of law. [*Federal Rules of Civil*
 24 *Procedure, Rule 56; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).*]

25

26 ^{1/}Interrogatory No. 6 refers to the sum of \$1,238.75 being the subject of some overcharge,
 27 however, this “fact” is irrelevant since the counterclaim does not seek recovery of any such
 28 overcharge. [*Schwarzer, Tashima & Wagstaffe, California Practice Guide: Federal Civil*
Procedure Before Trial (2007) “Summary Judgment” ¶14:27.1.]

1 Partial summary judgment is available when summary judgment is proper as to one or more,
 2 but not all claims for relief. [*Federal Rules of Civil Procedure*, Rule 56.] The moving party
 3 for partial summary judgment has the initial burden to show that no genuine issue of material
 4 fact exists. [*See Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991) *citing*
 5 *T.W. Elec. Serv. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 632 (9th Cir. 1987).] If
 6 the moving party satisfies this burden, the opposing party must go beyond the pleadings and
 7 by its own affidavits, depositions, answers to interrogatories, and admissions on file,
 8 designate specific facts showing that there is a genuine issue of material fact for trial. [*See*
 9 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).]

10

11 (B) BECAUSE THE RELATIONSHIP BETWEEN AT&T AND DATAWAY IN
 12 THIS CONTEXT ARISES OUT OF SERVICES TO WHICH THE END-USER
 13 OBTAINED ACCESS BY DIALING THE CARRIER'S ACCESS CODE, THE
 14 FILED RATE DOCTRINE STILL APPLIES – THE STATE LAW
 15 COUNTERCLAIMS AND DEFENSES ARE PREEMPTED.

16

17 Even assuming that one, some or all of the claims in the counterclaim are well-
 18 pleaded, have evidentiary proof, and support a claim for damages compensable under
 19 applicable law, state law counterclaims and defenses are barred by the Filed Rate Doctrine.^{2/}

20 As noted by the Supreme Court in *AT&T v. Central Office Telephone Inc.*, 524 U.S.

21 214 (1998):

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25 ^{2/}To paraphrase Mark Twain, the reports of the death of the Filed Rate Doctrine are greatly
 26 exaggerated. The Filed Rate Doctrine remains viable in a variety of contexts after passage of the
 27 1996 Telecommunications Act. [*See, e.g., Union Telephone Co. v. Qwest Corporation*, 495 F.3d
 28 1187 (10th Cir. 2007); *Qwest Corp. v. AT&T Corp.*, 479 F.3d 1206 (10th Cir. 2007);
Dreamscape Design, Inc. v. Affinity Network, Inc., 414 F.3d 665 (7th Cir. 2005); *Boomer v.*
AT&T Corporation, 309 F.3d 404 (7th Cir. 2002).]

1 “Section 203(a) of the Communications Act^{3/} requires every
 2 common carrier to file with the FCC “schedules,” i.e., tariffs,
 3 “showing all charges” and “showing the classifications,
 4 practices, and regulations affecting such charges.” 47 U.S.C.
 5 §203(a). Section 203(c) makes it unlawful for a carrier to
 6 “extend to any person any privileges or facilities in such
 7 communication, or employ or enforce any classifications,
 8 regulations, or practices affecting such charges, except as
 9 specified in such schedule.” §203(c). These provisions are
 10 modeled after similar provisions of the Interstate Commerce Act
 11 (ICA) and share its goal of preventing unreasonable and
 12 discriminatory charges. MCI Telecommunications Corp. v.
 13 American Telephone & Telegraph Co., 512 U.S. 218, 229—230
 14 (1994). Accordingly, the century-old “filed-rate doctrine”
 15 associated with the ICA tariff provisions applies to the
 16 Communications Act as well.”

17 [AT&T v. Central Office Telephone Inc., 524 U.S. 214, 221-222 (1998).]

18 The 1996 Telecommunications Act merely gives the FCC the authority to forbear
 19 from regulatory measures determined to be unnecessary to protect consumers. [47 U.S.C.
 20 §160(a); Ting v. AT & T, 319 F.3d 1126, 1131-1132 (9th Cir.2003)^{4/}.]

21 Notwithstanding the statutory authority under the 1996 Telecommunications Act to
 22 stand down from requiring tariffs, the FCC has determined that it is in the public interest to

23
 24 ^{3/}47 U.S.C. §203(a) has never been repealed.

25 ^{4/}Ting v. AT & T, 319 F.3d 1126 (9th Cir.2003) deals with detariffing generally, but does not
 26 address the unusual situation involving dial-around 1+ services for the obvious reason that
 27 there usually is not a formal negotiated agreement between the customer and the carrier
 28 since the customer becomes a “customer” by simply dialing the carrier’s carrier access code
 and accessing the carrier’s network. The terms and conditions of such use must by necessity
 and circumstance be found in tariffs filed with the FCC.

1 continue to require the filing of tariffs by nondominant carriers with respect to the provision
 2 of international and domestic, interstate, interexchange services through dial-around 1+
 3 services. In this regard, 47 C.F.R. §61.19(b) provides:

4 Carriers that are nondominant in the provision of international
 5 and domestic, interstate, interexchange services are permitted to
 6 file tariffs for dial-around 1+ services. For the purposes of this
 7 paragraph, dial-around 1+ calls are those calls made by
 8 accessing the interexchange carrier through the use of that
 9 carrier's carrier access code.

10 [47 C.F.R. §61.19(b).]

11 By order of the FCC, AT&T is a non-dominant carrier. [*In re Motion of AT&T Corp.*
 12 *to be Reclassified as a Non-Dominant Carrier, Order in FCC 95-427, para. 1* (Oct. 23,
 13 1995).] As such, AT&T is permitted to file tariffs governing the provision of international
 14 and domestic, interstate, interexchange services for dial-around 1+ services. AT&T has filed
 15 such a tariff in the form of Tariff No. 30 which governs calls placed through the AT&T
 16 network by dialing carrier access code 1010288. The filing of Tariff No. 30 invokes the
 17 Filed Rate Doctrine with respect to any state law claim or defense, whether sounding in tort
 18 or in contract, arising out of international and domestic, interstate, interexchange direct-dial
 19 services to which the end-user obtained access by dialing the carrier's access code. Hence,
 20 notwithstanding Dataway's suggestion to the contrary, the Filed Rate Doctrine still applies
 21 to the relationship at issue here. As such, any state law counterclaims and defenses in the
 22 context of this case are preempted.

23
 24 (C) IRRESPECTIVE OF THE FILED RATE DOCTRINE, ONE, SOME OR ALL
 25 OF THE COUNTERCLAIMS FOR RELIEF LACK MERIT.

26
 27 (1) ONE OR MORE ELEMENTS OF THE COUNTERCLAIM FOR
 28 BREACH OF EXPRESS CONTRACT CANNOT BE PROVED.

1 The first counterclaim for relief is entitled, Breach of Express Contract, and contains
 2 no allegation that any damages flowed from the alleged breach. [*Counterclaim (Docket No.*
 3 *31), pp. 16:20-17:14, ¶¶15-19.*]

4 In order to prevail in an action for breach of contract, the plaintiff must establish: (1)
 5 the existence of an enforceable agreement obligating the defendant to act or to forebear from
 6 acting; (2) the plaintiff's performance of all obligations required on its part by the agreement,
 7 except those excused by the defendant's breach; (3) the defendant's breach of the agreement
 8 by an inexcusable failure to act or failure to forebear from acting; and (4) damages to the
 9 plaintiff caused by the defendant's breach of the agreement. [*Reichert v. General Insurance*
 10 *Co.*, 68 Cal.2d 822, 830 (1968); *Acoustics, Inc. v. Trepte Constr. Co.*, 14 Cal.App.3d 887,
 11 913 (1971).]

12 AT&T did not contract to, or otherwise have a duty to, prevent access through the
 13 telephone system owned and operated by Dataway to the AT&T network by dialing carrier
 14 access code 1010288. No damages for which the law provides relief have been alleged. No
 15 evidence exists that any damages for which the law provides relief have been suffered.

16 The type of damage complained of which is characterized by Dataway as "time
 17 expenditure" is an estimate of the value of the time committed by employees of Dataway in
 18 the search for a resolution of the billing dispute with AT&T. California contract law does
 19 not compensate a party for the time its employees spend investigating and addressing a
 20 billing dispute. [*California Civil Code* §3300.]

21 The type of damage complained of which is characterized as "business interruption"
 22 is, in reality, an estimate, based upon a mere assumption, of the gross revenue^{5/} which

24 ^{5/}There is no indication that the amount sought for "business interruption" is net of expenses, i.e.,
 25 lost net profits. [*See Berge v. International Harvester Co.*, 142 Cal.App.3d 152, 161-162
 26 (1983).] Indeed, the figure appears to be a gross calculation of the estimated time multiplied by a
 27 seemingly conjured up hourly rate. [*See Sanchez-Corea v. Bank of America*, 38 Cal.3d 892, 907
 28 (1985) (*Evidence of lost profits must be unspeculative ...* "); *see also S.C. Anderson Inc. v. Bank*
of America, 24 Cal.App.4th 529, 536 (1994) (*The plaintiff has the burden to produce the best*
evidence available in the circumstances to attempt to establish a claim for lost profits.").]

1 allegedly could have been generated from Dataway's business activities had employees of
 2 Dataway not been allocating time to seeking a resolution of the billing dispute with AT&T.
 3 There is no evidence here that telephone service was ever actually interrupted.^{6/} California
 4 contract law does not compensate a party for lost revenue occasioned by the diversion of
 5 employee efforts from one activity to another, i.e. investigating and addressing a billing
 6 dispute. [*California Civil Code* §3300.]

7 In the absence of some damage claim cognizable under the applicable law, and
 8 supported by some evidence, judgment on the first counterclaim for relief in favor of the
 9 moving party is proper.

10

11 (2) ONE OR MORE ELEMENTS OF THE COUNTERCLAIM FOR
 12 BREACH OF ORAL CONTRACT CANNOT BE PROVED

13

14 Damages are an essential element of a claim for breach of contract.^{7/} [*Reichert v.*
 15 *General Insurance Co.*, 68 Cal.2d 822, 830 (1968); *Acoustics, Inc. v. Trepte Constr. Co.*, 14
 16 Cal.App.3d 887, 913 (1971).] The second counterclaim for relief is entitled, Breach of Oral
 17 Contract, and contains no allegation that any damages flowed from the alleged breach.
 18 [Counterclaim (Docket No. 31), pp. 17:18-18:4, ¶¶20-23.]

19

20 ^{6/}Compare White v. Southern California Edison Co., 25 Cal.App.4th 442, 448 (1994) ("In the
 21 absence of a contract between the utility and the consumer expressly providing for the furnishing
 22 of a service for a specific purpose, a public utility owes no duty to a person injured as a result of
 23 an interruption of service or a failure to provide service. ... The mere fact that the utility has
 24 contracted with the consumer to provide a service for general purposes, e.g., water or electricity,
 25 is not sufficient to create a duty. ".])

26 ^{7/}For the breach of an obligation arising from contract, the measure of damages ... is the amount
 27 which will compensate the party aggrieved for all the detriment proximately caused thereby, or
 28 which, in the ordinary course of things, would be likely to result therefrom." [*California Civil*
Code §3300.] "Whatever the proper measure of damages may be, in a given case, the recovery
 29 therefor is still subject to the fundamental rule that damages which are speculative, remote,
 30 imaginary, contingent, or merely possible cannot serve as a legal basis for recovery." [*Leuter v.*
State of California, 94 Cal.App.4th 1285, 1302 (2002).]

1 The second counterclaim for relief simply alleges "waiver". Waiver is the intentional
 2 relinquishment of a known right after knowledge of the facts. [*Roesch v. De Mota*, 24 Cal.2d
 3 563, 572 (1944).] A "waiver" may be an affirmative defense under the right set of facts, but
 4 an allegation of "waiver" does not constitute a claim for affirmative relief. [*Kern Sunset Oil*
 5 *Co. v. Good Roads Oil Co.*, 214 Cal. 435, 440-441 (1931); *see also* CACI No. 336.]
 6 Therefore, it is not surprising that the counterclaim for relief entitled, Breach of Oral
 7 Contract, contains no allegation that any damages flowed from the alleged breach.

8 Moreover, the evidence is undisputed that Dataway has never believed that AT&T had
 9 waived its claim involving the charges amounting to \$11,534.67.

10 For the same reasons stated with respect to the first counterclaim for relief, in the
 11 absence of some damage claim cognizable under the applicable law, and supported by some
 12 evidence, judgment on the second counterclaim for relief in favor of the moving party is
 13 proper.

14

15 (3) ONE OR MORE ELEMENTS OF THE COUNTERCLAIM FOR
 16 FRAUDULENT INDUCEMENT OF CONTRACT CANNOT BE PROVED.

17

18 The third counterclaim for relief for fraudulent inducement of contract is incoherent.
 19 At best, like the second counterclaim for relief, it merely sets up an affirmative defense.
 20 [*California Civil Code* §1572; *Grady v. Easley*, 45 Cal.App.2d 632, 634 (1941); *see also*
 21 CACI No. 335.] Fraud exists in two forms: (1) As an action for damages based upon fraud
 22 and deceit^{8/}; and, alternatively, (2) As a defense to the enforcement of a contract. [*California*

23

24 ^{8/}The necessary elements of a claim for fraud are: (1) misrepresentation (false representation,
 concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud, i.e., to
 induce reliance; (4) justifiable reliance; and (5) resulting damage. [*Molko v. Holy Spirit*, 46
 Cal.3d 1092, 1108 (1988).] Every element of a claim for fraud must be alleged in full, factually
 and specifically. [*Federal Rules of Civil Procedure*, Rule 9(b).] Damages allegedly resulting
 from fraud must also be pleaded with particularity. [*Nagy v. Nagy*, 210 Cal.App.3d 1262, 1268-
 1269 (1989) ("An allegation of a definite amount of damage is essential to stating a cause of
 action [for fraud].").]

1 Civil Code §§1572 and 1709.^{9/} Fraud is a defense where its presence vitiates consent.
 2 [California Civil Code §§1550 and 1572.] No damages for which the law provides relief
 3 have been alleged. No evidence exists that any damages for which the law provides relief
 4 have been suffered.^{10/} In the absence of some damage claim cognizable under the applicable
 5 law, and supported by some evidence, judgment on the third claim for relief in favor of the
 6 moving party is proper.

7

8 (4) ONE OR MORE ELEMENTS OF THE COUNTERCLAIM FOR
 9 "SLAMMING" CANNOT BE PROVED

10

11 In order to prevent telecommunications carriers from making unauthorized changes
 12 to subscribers' telephone service — a practice known as "slamming" — the
 13 Telecommunications Act of 1996 (the "1996 Telecommunications Act") makes it unlawful
 14 for telecommunications carriers to "submit or execute a change in a subscriber's selection of
 15 a provider of telephone exchange service or telephone toll service except in accordance with
 16 such verification procedures as the Commission shall prescribe." [*47 U.S.C. §258(a); AT&T*
 17 *Corp. v. FCC* 323 F.3d 1081, 1082 (D.C. Cir. 2003).]

18 The evidence shows that on July 24, 2006, the telephone system owned and operated
 19 by Dataway was allegedly compromised by an unauthorized intervening third party accessing
 20 the AT&T network by dialing carrier access code 1010288. No unauthorized changes to a
 21 subscriber's telephone service were made by AT&T. The calls made on July 24, 2006 were

22

23 ^{9/}Part 2 of Division 3 of the California Civil Code, commencing with §1549, describes the nature
 24 of a contract — The defense of fraud can be found here. Part 3 of Division 3 of the California
 25 Civil Code, commencing with §1708, describes obligations imposed by law — The action for
 26 fraud and deceit can be found here.

27 ^{10/}Fraud and deceit does not exist in a vacuum. [*City of Los Angeles v. Superior Court* , 51 Cal.2d
 28 423, 433 (1959); *Hill v. Wrather* , 158 Cal.App.2d 818, 825 (1958) ("[F]raud without damage or
 injury is not remediable. Deception which does not cause loss is not a fraud in the legal
 sense.").]

1 not the responsibility of AT&T, but rather a security failure on the part of Dataway.
 2 Insufficient evidence exists which supports the "slamming" claim. In the absence of some
 3 evidence that unauthorized changes were made by AT&T to Dataway's telephone service,
 4 and not the work of some unknown third party, judgment on the fourth counterclaim for
 5 relief in favor of the moving party is proper.

6

7 (5) ONE OR MORE ELEMENTS OF THE COUNTERCLAIM FOR
 8 "TORTIOUS INTERFERENCE" CANNOT BE PROVED

9

10 The tort cause of action for interference with a contract^{11/} does not lie against a party
 11 to the contract. *[Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 514
 12 (1994).] The fifth counterclaim for relief fails to state a claim upon which relief can be
 13 granted inasmuch as the only contractual relationship alleged throughout the counterclaim
 14 is between AT&T, on the one hand, and Dataway, on the other hand. Moreover, the fifth
 15 counterclaim for relief does not plead resulting damages. In the absence of some damage
 16 claim cognizable under the applicable law, and supported by some evidence, judgment on
 17 the fifth counterclaim for relief in favor of the moving party is proper.

18

19 (C) A TELEPHONE CUSTOMER IS LIABLE FOR ALL LONG-DISTANCE
 20 CALLS MADE FROM ITS ON-PREMISES SYSTEM, REGARDLESS OF
 21 WHETHER SUCH CALLS WERE AUTHORIZED OR FRAUDULENT.

22 ///

23 ///

24

25 ^{11/}"The elements which a plaintiff must plead to state the cause of action for intentional
 26 interference with contractual relations are (1) a valid contract between plaintiff and a third party;
 27 (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a
 28 breach or disruption of the contractual relationship; (4) actual breach or disruption of the
 contractual relationship; and (5) resulting damage." *[Pacific Gas & Electric Co. v. Bear Stearns*
& Co., 50 Cal.3d 1118, 1126 (1990).]

1 Through the complaint in this action, AT&T seeks to recover \$11,534.67, together
 2 with prejudgment interest of \$5.69 per day from September 25, 2006 using the rate of 18%
 3 per annum pursuant to AT&T Tariff F.C.C. No. 30, Section 3.5.4, for calls placed through
 4 the telephone system owned and operated by Dataway by dialing AT&T's carrier access code
 5 1010288.

6 A telephone customer is liable for *all* long-distance calls made from its on-premises
 7 system^{12/}, regardless of whether such calls were authorized or fraudulent. [*AT & T Corp. v.*
 8 *Community Health Group*, 931 F. Supp. 719, 723 (S.D.Cal. 1995) (*Emphasis in original.*).]
 9 The presence of a remote access mechanism, including an off premises computer, does not
 10 affect the "origination" determination; calls still "originate" from a customer's system even
 11 if access to the system was gained from a remote location. [*AT & T Corp. v. Community*
 12 *Health Group*, 931 F. Supp. 719, 723 (S.D.Cal. 1995).]

13 The FCC has held that a party may become an AT&T customer by ordering services
 14 in both the more traditionally understood manner or by unauthorized usage involving
 15 incoming 800 service calls or LDMTS^{13/} calls and/or services that originate at the customer's
 16 numbers. [*See, e.g. In the matter of Chartways Tech., Inc. v. AT&T*, 6 F.C.C.R. 2951, 2954
 17 (*FCC ruled that a customer was responsible for all of the charges originating at its*
 18 *number or numbers, regardless of claims that those charges may or may not have been*
 19 *unauthorized.*).]^{14/}

20
 21 ^{12/}A PBX system is "a customer-provided private switching system used to facilitate the
 22 transmission of telephone calls to, from, and within a place of business. It is equipment added to
 23 the public telephone network by a customer ... the use of which requires neither the knowledge
 24 nor approval of AT & T." [*AT&T v. Jiffy Lube Int'l, Inc.* (D. Md. 1993) 813 F. Supp. 1164, 1165,
 25 *fn. 1.*]

26
 27 ^{13/}LDMTS stands for "long distance message telecommunication service". [*AT&T v. New York*
 28 *City Human Resource Administration*, 736 F.Supp. 496, 497 (1990).]

29
 30 ^{14/}The rule that all calls, fraudulent or not, originating from a number and utilizing AT&T's
 31 LDMTS calls and/or services makes that party a customer and obligates them to pay those
 32 charges has been applied in numerous cases, including *AT&T Corp. v. Fleming and Berkeley*,
 33 131 F.3d 145 (1997), *AT&T v. Intrend Ropes & Twines, Inc.*, 944 F.Supp 701 (1996), *AT&T*

1 In the case of FCC v. W.C.N. Listeners Guild, 450 U.S. 582 (1981), the Supreme
 2 Court followed its previously enunciated rule that "the construction of a statute by those
 3 charged with its execution should be followed unless there are compelling indications that
 4 it is wrong...." [FCC v. W.C.N. Listeners Guild, 450 U.S. 582, 598 (1981).] Therefore, this
 5 court must therefore give deference to the rule enunciated by the FCC that a customer is
 6 responsible for all of the charges originating at its telephone number or numbers, regardless
 7 of whether that party claims that those charges were not authorized. In fact, other courts
 8 when presented with this identical situation have followed this rule.

9 For example, in AT&T v. New York City Human Resource Administration, 833
 10 F.Supp. 962 (1993), the court was asked to rule on AT&T's motion for summary judgment
 11 seeking payment of LDMTS services which the New York City Human Resources
 12 Administration and the City of New York claimed should not be paid because they were the
 13 result of unauthorized third party toll fraud. The court concluded that the defendants were
 14 in fact customers of AT&T notwithstanding that the toll calls were fraudulent and held that
 15 AT&T was entitled to summary judgment. [AT&T v. New York City Human Resource
 16 Administration, 833 F.Supp. 962, 973 (1993).]

17 In AT & T Corp. v. Community Health Group, 931 F. Supp. 719 (S.D.Cal. 1995), the
 18 court was faced with a situation almost identical to that presented here. In that case, the court
 19 granted AT&T's motion for summary judgment, finding that Community Health Group was
 20 liable for payment of LDMTS charges, even though those charges were the result of
 21 unauthorized and fraudulent usage of their telephone system. The court noted that
 22 Community Health Group was a "customer" even though it did not affirmatively order
 23 AT&T LDMTS and had pre-subscribed for long distance service with an entirely different
 24 carrier. The court concluded that all of the applicable authority clearly supported AT&T's
 25 ///

26
 27 Corp. v. Community Health Group, F.Supp 719 (1995), AT&T v. Jiffy Lube International, Inc.,
 28 813 F.Supp 1164 (1993) and Industrial Leasing Corporation v. GTE Northwest. Incorporated,
 818 F.Supp 1371 (1992).

1 position that it was entitled to summary judgment. [*AT & T Corp. v. Community Health*
 2 *Group*, 931 F. Supp. 719, 722-725 (S.D.Cal. 1995).]

3 Since there is no dispute that the calls originated from Dataway's system and account
 4 numbers, the fact that Dataway alleges that they were unauthorized and fraudulent is simply
 5 irrelevant to the disposition of this claim. Although the use of those numbers may have in
 6 fact been unauthorized, the law is clear that the Dataway is and was, for the purposes of this
 7 matter, a customer of AT&T and is required to pay the charges. [See e.g., *AT&T Corp v.*
 8 *Fleming and Berkeley*, 131 F.3d 145 (1997), *AT&T v. Intrend Ropes & Twines , Inc.*, 944
 9 *F.Supp. 701 (1996)*, *AT&T Corp. v. Community Health Group*, 931 F.Supp. 719 (1995),
 10 *AT&T v. Jiffy Lube International, Inc.*, 813 F.Supp 1164 (1993), *Industrial Leasing*
 11 *Corporation v. GTE Northwest.Inc.*, 818 F.Supp. 1372 (1992) and *AT&T v. New York City*
 12 *Human Resources Administration*, 833 F.Supp 962 (1993).]

13 "[T]he repeated occurrence of remote access fraud does not create a general duty on
 14 AT&T's part to warn its LDMTS customers the possibility of unauthorized access to their
 15 PBX because the applicable tariff does not impose such a duty." [*AT&T v. New York City*
 16 *Human Resources Administration*, 833 F.Supp 962, 977 (1993).] There is no evidence that
 17 can be offered by Dataway that AT&T was responsible for the installation and maintenance
 18 of Dataway's telephone system. In fact, exactly the opposite is true. Therefore, there is no
 19 duty owed by AT&T to Dataway to prevent the toll fraud alleged by Dataway.

20 For the foregoing reasons, AT&T is entitled to summary judgment on the complaint
 21 or partial summary judgment as to the first and/or second claims for relief.

22 .
 23 (D) IF THIS MOTION IS DENIED, THIS COURT SHOULD ENTER AN
 24 ORDER SPECIFYING WHAT FACTS ARE NOT GENUINELY AT ISSUE AND
 25 WHAT ISSUES ARE WITHOUT SUBSTANTIAL CONTROVERSY —
 26 INCLUDING ITEMS OF DAMAGES OR OTHER RELIEF.

27 ///

28 ///

If the Court determines that summary judgment or partial judgment would be improper on this record, the Court is requested, after examining the pleadings and evidence before it and by interrogating the attorneys, to enter an order specifying what facts are not genuinely at issue and what issues are without substantial controversy — including items of damages or other relief — pursuant to Federal Rules of Civil Procedure, Rule 56(d)(1), Williams v. Sinclair, 529 F.2d 1383 (9th Cir. 1975), and USDC, ND CA Local Rule 56-3.

3. CONCLUSION

For the foregoing reasons, this Court should enter an order granting summary judgment or partial summary judgment in favor of Plaintiff AT&T Corp. on the complaint, and/or the counterclaim, or one or more of the claims stated therein, or alternatively, grant any other relief the circumstances require under Federal Rules of Civil Procedure, Rule 56(d)(1).

DATED: July 1, 2008

AIRES LAW FIRM

By:



Timothy Carl Aires, Esq.
Attorney for Plaintiff and Counterdefendant,
AT&T CORP

1 REQUEST FOR JUDICIAL NOTICE
2

3 REQUEST IS HEREBY MADE pursuant to Federal Rules of Evidence, Rule 201 that
4 this Court take judicial notice of the following:

5

6 1. The Complaint of Plaintiff AT&T Corp. (Docket No. 1).

7

8 2. The Answer of Defendant Dataway Inc. dba Dataway Designs (Docket No. 31).

9

10 3. The Counterclaim of Counterclaimant Dataway Inc. dba Dataway Designs
11 (Docket No. 31).

12

13 4. The Declaration of Anne-Leith Matlock in Support of Answer to Complaint
14 Filed by AT&T and Counterclaim (Docket No. 32).

15

16 5. The Declaration of Simon Lewis in Support of Answer to Complaint Filed by
17 AT&T Corp. and Counterclaim (Docket No. 32-4).

18

19 6. The Declaration of Anne-Leith Matlock in Support of Motion to Dismiss
20 Complaint Filed by AT&T Corp. (Docket No. 56).

21

22 7. The Declaration of Simon Lewis in Support of Motion to Dismiss Complaint
23 Filed by AT&T Corp. (Docket No. 56-4).

24

25 8. 47 C.F.R. §61.19.

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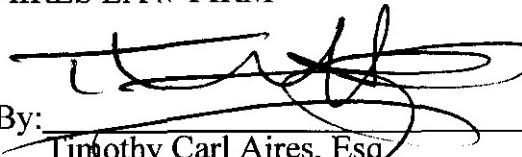
1 9. In re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,
2 Order in FCC 95-427, para. 1 (Oct. 23, 1995).

3
4 10. AT&T Tariff No. 30.

5
6 DATED: July 1, 2008

AIRES LAW FIRM

7
8 By:

9 
10 Timothy Carl Aires, Esq.
11 Attorney for Plaintiff and Counterdefendant,
12 AT&T CORP.

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1 DECLARATION OF JAMES LAKE
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3

I, JAMES LAKE, declare as follows:

5 1. The following facts are of my own personal, first-hand knowledge, and if
6 called and sworn to testify thereto, I could and would competently do so.

8 2. I am employed by AT&T in the capacity of AT&T Area Manager. I am
9 responsible for management of the Fraud Resolution Group (FRG), Shortfall Termination
10 Analysis Team (STAT) and the Customer Refund Investigations Team. I handle results
11 reporting, escalations from internal and external customers, adjustment approvals, serve as
12 a liaison between Sales, Legal and CFO, and supervise a team of eighteen management and
13 non management employees. In this capacity, I am familiar with the operations of AT&T
14 and the nature, source and extent of relationships between AT&T and its "customers" as well
15 as the tariffs governing those relationships.

17 3. AT&T is a corporation organized and existing under the laws of the State of
18 New York with its principal place of business located at 1 AT&T Way, Bedminster, New
19 Jersey and, therefore, a citizen of the State of New Jersey, authorized to do business in the
20 State of California and is a common carrier providing telecommunications services under
21 published tariffs.

23 4. AT&T Tariff 30, Section 5, "Casual Calling Services", a true and correct copy
24 of which is attached hereto as Exhibit "A", permits callers who are not pre-subscribed to
25 AT&T to access AT&T's switched network for completion of their state-to-state and
26 international dial station calls by dialing carrier access code, 1010288. AT&T Tariff 30 is
27 filed with the Federal Communications Commission under 47 C.F.R. §61.19. My
28 investigation indicates that on July 24, 2006, the telephone system owned and operated by

1 Dataway Inc. dba Dataway Designs ("Dataway") was allegedly compromised by an
2 unauthorized intervening third party accessing the AT&T network by dialing carrier access
3 code 1010288 which created an entirely new account for Dataway. Our investigation
4 determined that no unauthorized changes to a subscriber's telephone service were made by
5 AT&T. Our investigation determined that the calls made on July 24, 2006 were not the
6 responsibility of AT&T, but rather a security failure on the part of Dataway if the calls were
7 indeed unauthorized. AT&T did not contract to, or otherwise had a duty to, prevent access
8 through the telephone system owned and operated by Dataway to the AT&T network by
9 dialing carrier access code 1010288.

10

11 5. In my employment capacity, I am familiar with the methods used in making
12 database entries and maintaining the records of the accounts receivables and other documents
13 reflecting of agreements and contracts of my employer which are made or entered into in the
14 regular course of business, and are made at or near the time of the occurrence of the
15 transactions which are recorded or otherwise documented. I can, and do, as an employee of
16 my employer, testify to the identity of said records and documents and their mode of
17 preparation and maintenance. The records and documents accompanying this declaration
18 were created, executed and/or received by employees of my employer in the regular course
19 of business and are maintained in the files of my employer. My employer periodically
20 generates invoices for telecommunications services provided by my employer for our various
21 customers. As a result of my employment duties, I am familiar with the mode of preparation
22 of my employer's invoices and other accounting records and the maintenance of those
23 records after invoices are generated and sent to our customers. Through the assignment of
24 a customer account number, data integrity is maintained throughout our billing process to
25 insure that a particular customer is only billed for telecommunications services rendered to
26 it. With respect to Dataway's access to the AT&T network by dialing carrier access code
27 1010288, the customer account number 0517883374001 has been assigned. After
28 telecommunications services are provided by my employer to our various customers, the data

1 concerning the telecommunications services provided is transmitted to the accounting
2 department. The accounting department then use the data concerning work performed in
3 generating invoices for each customer through our computerized accounting system. Once
4 the invoices are generated, the invoices are placed in addressed, sealed envelopes, postage
5 prepaid, and then mailed to the various customers. Copies of the invoices are then
6 maintained in our records in either hard-copy or electronic form, as the case may be. Those
7 copies are stored in our accounting files. Once generated, the information contained on the
8 invoices is then memorialized on a statement or statements of account as part of my
9 employer's accounts receivable computer data base. The statement of account reflects the
10 debits and credits to the account of Dataway.

11

12 6. Dataway was billed for the charges incurred when its telephone system was
13 allegedly compromised on July 24, 2006 by a written invoice, a true and correct copy of
14 which is attached hereto as Exhibit "B". AT&T provided telecommunications services to
15 Dataway pursuant to AT&T Tariff F.C.C. No. 30 which makes Dataway liable for the
16 payment of charges for calls placed using its system through the AT&T network by dialing
17 carrier access code 1010288. These charges amount to \$11,534.67 and were included on an
18 invoice presented to Dataway. Pursuant to AT&T Tariff F.C.C. No. 30, payment was due
19 upon presentation of the invoice.

20

21 7. The records of AT&T show that neither the whole nor any part of the amount
22 due has been paid by Dataway, although demand therefor has been made by AT&T through
23 invoicing and other collection efforts. The records of AT&T show that there is now due and
24 owing from Dataway to AT&T the sum of \$11,534.67, together with prejudgment interest

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1 of \$5.69 per day from September 25, 2006 using the rate of 18% per annum pursuant to
2 AT&T Tariff F.C.C. No. 30, Section 3.5.4.

3

4 I declare under penalty of perjury under the laws of the State of California and the
5 United States of America that the foregoing is true and correct and that this Declaration was
6 executed on this 30th day of June, 2008 at Bedminster, New Jersey.

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JAMES LAKE

DECLARATION OF TIMOTHY CARL AIRES

I, TIMOTHY CARL AIRES, hereby declare and state as follows:

1. The following facts are of my own personal, first-hand knowledge, and if called and sworn to testify thereto, I could and would competently do so.

2. I am an attorney at law, duly licensed to practice before all courts of the State of California as well as this Court and am a member of the Aires Law Firm, counsel for Plaintiff and Counterdefendant AT&T Corp.

3. Attached hereto as Exhibit "C" is a true and correct copy of Responses of Dataway Inc. to Special Interrogatories, Set No. One.

4. On April 15, 2008, I took the deposition of Francisco J. Molieri pursuant to Federal Rules of Civil Procedure, Rule 30 before a certified court reporter licensed to administer oaths in the State of California. Attached hereto as Exhibit "D" are true and correct copies of the following pages: 1-4,16-20, 26-35, 58-59

5. On April 15, 2008, I took the deposition of Simon Lewis pursuant to Federal Rules of Civil Procedure, Rule 30 before a certified court reporter licensed to administer oaths in the State of California. Attached hereto as Exhibit "E" are true and correct copies of the following pages: 1-4, 8-11, 47-48

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 1st day of July, 2008, in Newport Beach, California.

TIMOTHY CARL AIRES